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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 508

ALBO TRADING CORPORATION,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, the Albo Trading Corporation, prays that writ of certiorari issue to review the judgment of the United States Court of Claims which was entered in the above case on June 5, 1951, and became final by the denial of a motion for a new trial on October 2, 1951. The Opinion of the Court of Claims is not published in the Court of Claims Reports, but is included as a part of the record herein (R. 17 to 18).

Jurisdiction

The jurisdiction of this Court is invoked under Section 28, U. S. Code 1255, and the Appendix to the Rules of the

Supreme Court of the United States, Sec. 240, Subsection 3 (b).

Statement

In August, 1933 the Petitioner purchased from the Schenectady Depot of the United States Army 3,334 Marlin aircraft machine guns together with 1,515 pounds of miscellaneous machine gun parts. The guns had been mutilated before the sale by burning the barrels and receivers with an acetylene torch so that they were not in operable condition (Finding 1, R. 11). Between 1933 and 1936, Petitioner sold a few hundred of these guns as souvenirs at prices each ranging from $7.75 at first to $9.75 later (Finding 3, R. 12).

In 1936, Petitioner learned that it was possible to repair the guns so that they could be used and it discontinued the sale as souvenirs (Finding 3, R. 6). The Petitioner acquired a large supply of parts for these guns at a later date (Finding 2, R. 12).

In October, 1940, Petitioner sold 26 of the mutilated Marlin guns to R. F. Sedgely, Inc., a licensed dealer in arms, at $45.00 each, and in January, 1941, Petitioner sold to the same concern 47 of these guns and 15 such guns in January 1942, all at the price of $45.00 each (Finding 4, R. 13).

In 1941, one Aubrey W. Lyon, acting for the Petitioner, sold the Van Karner Ordnance Corporation, a licensed dealer in arms, 50 of Petitioner's mutilated Marlin machine guns at $50.00 each, and gave the Van Karner Ordnance Corporation an option to purchase 50 additional guns of the same type every 15 days thereafter (Finding 4, R. 13).

The Van Karner Ordnance Corporation exercised its option up to June 23, 1942, at which time that contract was terminated and an agreement was entered into between the Petitioner and the Van Karner Chemical Arms Corporation, a licensed dealer in arms, successor to Van Karner

Ordnance Corporation, whereby the latter Corporation purchased 100 of the Petitioner's said guns at $50.00 each, and the latter Corporation was given the option to purchase 50 additional guns each month thereafter at the same price. This option was exercised through October 15, 1942 and was in effect on November 16, 1942 (Finding 4, R. 13).

The Van Karner Corporation reconditioned and sold the guns sold them by Petitioner, and, as late as October 15, 1942, the United States Navy was negotiating with the Van Karner Corporation for the purchase of 2,500 of these guns, reconditioned, at $266.00 each (Finding 10, R. 16).

In the dissolution of the Van Karner Ordnance Corporation, Alfred Ettlinger, one of the interested parties, took as his share of the inventory of that Corporation 550 of the mutilated Marlin machine guns sold to that Corporation by Petitioner. In the latter part of July, 1942, Ettlinger entered into contracts with R. F. Sedgely, Inc. for the sale to that Company of 250 of the said mutilated Marlin machine guns at a price of $40.00 each, with an option to the said R. F. Sedgely, Inc. to purchase the remaining 300 guns at $40.00 each at the rate of 50 guns per month. R. F. Sedgely, Inc. had exercised its option to take the guns up to November 15, 1942 (* Albo, Ettlinger, 317-9; Pltff. Exs. 23, 23A, 24, 25).

On November 16, 1942 the guns owned by Petitioner, Ettlinger and R. F. Sedgely, Inc. were the only mutilated Marlin machine guns available for sale to licensed dealers in arms (R. Albo, Sagor 72). On November 16, 1942, the

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* In petitioners case below, the parties stipulated that the evidence in *Aircraft Trading Corp.* v. *U. S.*, No. 46045, 109 Ct. Cl. 435 and *Van Karner Chemical Arms Corp.*, No. 46113, 109 Ct. Cl. 425, be considered as evidence in the instant case in so far as it was relevant and material. Petitioner designated to the court below certain parts of the evidence in these three cases to be made a part of the record in this Court. The respondent designated all the evidence in three cases, all of which the lower court sent up as part of the record. We herein refer to the evidence in these cases as "Albo", "International" or "Van Karner".

Petitioner had 1,492 of the mutilated Marlin machine guns and an adequate supply of new barrels, receivers, and other parts therefor that were available to its purchasers of Marlin guns.

On November 16, 1942, Respondent, under the powers conferred in the Act of October 16, 1941 (chapter 445, 55 Stat. 742, as amended Appendix hereto), requisitioned from the Petitioner 1,492 mutilated Marlin machine guns and 37 cases containing machine gun parts (Finding 6, R. 8). By far the greater part of the machine gun parts available to Petitioner were stored at the plant of R. F. Sedgely, Inc. at Philadelphia and were not requisitioned from Petitioner (R. 8).

R. F. Sedgely, Inc. paid the Petitioner $12,700.00 for the parts stored in its plant after the requisition of Petitioner's guns (Albo, Paley, 388-9).

The Respondent made no effort to dispose of Petitioner's guns and parts therefor to be used as guns. The Respondent held that the guns and parts taken had no value other than as scrap, and the Court awarded the Petitioner as just compensation therefor the sum of $282.78 as their scrap value (Finding 12, R. 17), notwithstanding the fact that the Petitioner's selling price for the guns alone at $50.00 each, at the time of requisition on November 16, 1942, would have been $74,600.00, and Petitioner's selling price at that time of the extractors and other articles taken by Respondent was $5,200.00 (Finding 4, R. 12; Albo, Pltff Ex. 15).

The Petitioner had 4,550 Marlin machine gun belts, that it had purchased for $1.00 each, that it was selling them at that price as parts for and adjuncts to its guns sold (Albo, Paley 186-7). Respondent did not take the belts and the Petitioner was able to dispose of the belts for only a few dollars. It sustained a loss of $4,550.00 on the machine gun belts left on its hands (Finding 11, R. 17).

Relevant Part of Statute Relied Upon
Appendix Hereto

Questions Presented

1. That there is a lack of substantial evidence to sustain the Court's findings:

(a) In Section 10 of the Court's Special Findings of Fact, by inference, the Court held that there was no market for Petitioner's mutilated Marlin machine guns and spare parts and accessories therefor after October, 1942 (R. 16).

(b) That the Court's Finding 8, (R. 15),

> "About 1922 the United States Army had determined that the Marlin gun was obsolete in the sense that it was no longer suitable for the purpose for which it was originally intended, * * *."

is not substantiated by any evidence and is directly contrary to testimony of Respondent's own witnesses.

(c) The lower Court's Finding 12, (R. 17), that the fair value of the material requisitioned from Petitioner on November 16, 1942, was $282.78, their scrap value.

2. That the Court failed to make findings of fact on the following material issues:

(a) The Court failed to find that Petitioner had available for sale to purchasers of its mutilated guns a sufficient supply of gun parts for reconditioning and servicing the guns or the prices it was receiving for such spare parts up to the time of the requisition by the Respondent (Supra p. 3).

(b) That the demand for Petitioner's mutilated Marlin machine guns as souvenirs continued up to and long after November 16, 1942.

(c) The Court in its Finding 4, R. 12, failed to find that the option given to the two Van Karner Corporations covered all of the mutilated Marlin machine guns owned by Petitioner.

(d) That the Petitioner sold to the Van Karner Corporations, for use with the mutilated guns sold those Corporations by Petitioner, all spare parts for the guns required by those Corporations.

(e) That the Court failed to find the terms of the written requisition served upon Petitioner. (Albo, Pltff's Ex. 10).

(f) That Petitioner's market for mutilated guns did not include the United States or its allies but was only with arms dealers duly licensed by the United States.

(g) That Alfred Ettlinger in 1942 was the owner of 550 mutilated Marlin machine guns formerly sold by Petitioner and that Ettlinger had sold in monthly sales to R. F. Sedgely, Inc., 400 of these guns between July and November 16, 1942, at $40.00 each. The Sedgely Company had an option on November 16, 1942 to purchase the remainder of the Ettlinger guns at 50 per month at the same price, and Sedgely attempted to exercise its option after November 16, 1942. (Albo, Ettlinger 317-320).

(h) That in the event the Van Karner Corporation failed to exercise its option to purchase Petitioner's guns, another licensed arms dealer was ready, willing, and able to purchase all of Petitioner's said guns at $50.00 each.

(i) The Court failed to find as a part of its Finding 10, R. 16, that the Marlin machine guns and parts therefor offered for disposal by the Navy Department, through the Munitions Assignment Committee of the War Department, were not offered as good guns or shootable guns and made no representation as to the condition of the guns and no warranty as to the guns or supply or spare parts, and at the same time that Committee was offering and assigning to the same persons the new and superior Browning machine guns on Lend-Lease terms.

(j) That the 4,550 canvas machine gun belts were parts for the Marlin machine guns. (Albo, Paley 187-8).

3 (a) The Court erred as a matter of law in its Finding 12, R. 17, in holding that the scrap value of the

guns and parts taken was the fair value thereof; and it should have awarded Petitioner the market value of the guns and parts as shown by the records of sales up to the time of requisition.

(b) That the fair and just compensation under the Fifth Amendment to the Constitution and the Act of October 16, 1941 [C. 45, 55 Stat. 742] for the Petitioner's property requisitioned was not scrap value to the Respondent but market value as shown by sales of such property up to the date of requisition.

Reasons Relied upon for the Allowance of the Writ of Certiorari

(1) The Court found as facts certain matters material to the issues that were not sustained by the evidence.

(2) The Court failed to find facts relating to material issues in the case that were established by the evidence.

(3) The Court failed to apply the rule established by this Court as to the determination and just compensation for property taken by the Government.

(4) That if the rule of the Court, for determination of the just compensation required to be paid under the Constitution and the Act under which the property was taken, is adhered to, the Respondent can in the future take property of individuals and disregard its value established by sales over a period of years and determine the value to be only for scrap purposes.

(5) The rule of the Court is in error in that it held that the value of the property taken is the value to it as scrap and disregarded the value of the property to the Respondent.

(6) The Court ignored the clear mandate of Congress to determine the amount of fair and just compensation for the property taken.

Conclusion

For the foregoing reasons, it is respectfully submitted that this Petition should be granted.

HORACE S. WHITMAN,
Attorney for Petitioner.

JULIUS B. LIMER,
Of Counsel.

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APPENDIX

Relevant Parts of Statutes Involved

Act of October 16, 1941, Chapter 445, 55 Stat. 742: Section 721—Requisition of Military Material for the United States; Compensation.

Whenever the President, during the national emergency declared by the President on May 27, 1941, * * * determines that (1) the use of any military or naval equipment, supplies, or munitions, or component parts thereof, or machinery, tools, or materials necessary for the manufacture, servicing, or operation of such equipment, supplies, or munitions is needed for the defense of the United States * * *, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided and to dispose of such property in such manner as he may determine is necessary for the defense of the United States. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act * * *, but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the fifth amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for the property is unwilling to accept the same as full and complete compensation for such property he shall be paid 50 per centum of such amount and shall be entitled to sue in the United States Court of Claims * * * for an additional amount which, when added to the amount so paid to him, he considers to be fair and just compensation for such property. * * *

BRIEF IN SUPPORT OF PETITION

The Judgment and Opinion of the Court of Claims in this matter is not printed in the Reports of that Court but it is included in the record hereof (pp. 17 to 18).

The Grounds on Which the Jurisdiction of This Court Is Invoked

1. The Court failed to find material and pertinent facts duly proven.

2. The Court found as facts matters that were not sustained by the evidence.

Appendix to Supreme Court Rules, Act of Feb. 13, 1925, as amended. Section 240, subsection 3 (b).

3. The Court failed to follow the proper rule, as established by this Court, for the determination of just compensation for the Petitioner's property requisitioned.

4. The Court in its judgment awarded the Petitioner the value of the property requisitioned to the Respondent and disregarded the real value of the property requisitioned as determined by sales over a period of years.

Statement of the Case

A sufficient Statement of the Case is contained in the Petition filed herewith.

Assigned Errors

The Court failed to find material facts relating to the sales of the mutilated Marlin machine guns both before and after the requisition. The Court found as facts matters that are not sustained by the evidence. The Court did not apply the proper measure of damages to determine the just compensation to which the Petitioner was entitled. The errors are detailed in the Petition under the hearing, *Questions Presented.*

Argument

Petitioner in 1933 had purchased from the Respondent at its Schenectady depot all of the mutilated machine guns offered for sale by Respondent. It purchased 3,334 of the Marlin mutilated guns. It had sold several hundred of the guns as souvenirs ranging in prices from $7.75 to $9.75. When the Petitioner learned that these guns could be reconditioned and made usable again, it stopped selling them for $9.75 and proceeded to sell them to licensed dealers in arms to be reconditioned and disposed of as the puchasers saw fit. Between October 7, 1940 and January 6, 1942, it sold Sedgely 142 of the Marlin guns at $45.00 each (Finding 4, R. 12; Albo, Plaintiff's Exhibit 15). Between April 29, 1941 and October 15, 1942, it sold the Van Karner Corporations 1,353 guns in 25 lots at $50.00 each (Albo, Plaintiff's Exhibit 15). Van Karner had the option to purchase the remainder of the Petitioner's guns at the same price (Albo, Plaintiff's Exhibits 8, 9, and 15).

The Court failed to find the following facts:

In a reorganization of the Van Karner Ordnance Corporation Ettlinger took 550 of the mutilated Marlin guns that had been sold to that Company by the Petitioner. Ettlinger in July, 1842 entered into two contracts by which he sold to R. F. Sedgely, Inc. 250 of the said guns at $40.00 each and gave the Sedgely Company the option to purchase the remaining 300 guns in monthly lots, all at $40.00 each (Albo, Ettlinger 317-324; Exs. 23, 23A, 24 and 25).

These sales of mutilated Marlin machine guns covered all of such guns that were available for sale during that period.

The market for these guns was limited to licensed dealers and not the United States. Both the Petitioner's guns and the Ettlinger guns were under option to purchasers and could not therefore be sold elsewhere as the two purchasers

had exercised their options up to and through the month of October, 1942. We submit that the thirty-three sales covering that period from October, 1940 through October, 1942 do establish the market value for these guns of from $40.00 to $50.00 each, Petitioner, however, receiving the higher price of $50.00 each for its guns. (Finding 4, R. 12-13; Albo, Pltff's Ex. 15.)

The Court also failed to find that R. F. Sedgely, Inc. even after the requisition by the Respondent and before the award of scrap values for gun parts taken, paid the Petitioner $12,700.00 for Petitioner's interest in gun parts taken from the Sedgely plant in Philadelphia. (Albo, Paley 388-9).

The Court's Finding 10 that there was practically no market for their guns after October, 1942 and no market for their spare parts and accessories is not borne out by the evidence. R. F. Sedgely, Inc. attempted to exercise its option for the purchase of guns on November 27 (Albo, Pltff. Exs. 24 and 25) and Sagor, a licensed and experienced dealer in arms, who had taken part in the negotiation of the Van Karner contracts, was ready, willing and able to buy all of the Petitioner's guns on November 16 if Van Karner had not exercised its option to take the guns (Albo, Sagor 71-74).

The Court held in its Finding 8, R. 15, that the United States Army in 1922 had determined that the Marlin gun was obsolete in the sense that it was no longer suitable for the purpose for which it was originally intended. Respondent's own witnesses show that the Marlin gun, although it had been superseded by the new Browning gun, was still capable of performing the functions for which it had been originally manufactured and was a perfectly usable gun (International, Green 456, 492-8; Studler 5423).

The Court failed to find that Petitioner had available for sale to purchasers of its mutilated guns a sufficient supply

of parts for reconditioning and servicing the guns. In the two previous cases in the Court of Claims relating to the reconditioned guns, the *International Aircraft Trading Corporation* v. *U. S.*, 109 Ct. Cl. 435, and the *Van Karner Chemical Arms Corporation* v. *U. S.*, 109 Ct. Cl. 425, the Court held that a lack of sufficient parts for reconditioning and servicing the guns was an element of depreciation in value. In this case, however, it was proved conclusively that the Petitioner did have available an adequate supply of parts to recondition and service all of its guns and those sold to others who were doing that work (Albo-Paley 176-9, 214-221, 226-232, 243-6, 357-362, 388-394; Limer 127-8, 149-150; Sagor 93-4, 404.)

The Court also failed to find the prices that the Petitioner was receiving for parts sold. The record is clear on this subject and shows that the Respondent took 10,000 extractors which the Petitioner was selling at 20¢ each. It also took 200,000 miscellaneous spare parts for which the Petitioner would have received $2,350.00 (Albo, Paley 177-9, 245-7).

The Court also failed to find that the demand for Petitioner's guns as souvenirs continued up to and long after November 16, 1942 (Albo, Paley 192-5).

The Court failed to find that the options given by Petitioner to the two Van Karner Corporations covered all of the mutilated machine guns owned by Petitioner. As the Van Karner Corporations exercised their options to take Petitioner's guns, Petitioner was precluded from selling any of its mutilated guns elsewhere (Albo, Sagor 71).

The Court failed to find that the Petitioner sold the Van Karner Corporations for use in reconditioning the mutilated guns, all spare parts therefor required by those corporations (Albo, Pltff. Ex. 15).

The Court also failed to find that Petitioner's market for its mutilated guns was with licensed arms dealers and

the United States was never offered or sold any of Petitioner's guns or spare parts (Albo, Paley 363-7). This matter is material because the Court in its findings compared Petitioner's guns with those that were standard for the United States forces. The United States standards had nothing whatever to do with the Petitioner's sales.

The Court refused and failed to find the facts with regard to the Ettlinger guns that were sold to R. F. Sedgely, Inc. (Albo, Pltff. Exs. 23, 23A, 24 and 25). The sales by Ettlinger are directly in point because it shows that similar guns were sold by Ettlinger from July, 1942 on to Sedgely and even on November 27 after the requisition of all the guns from Sedgely's plant, Sedgely was still demanding that Ettlinger fulfill his contract by delivering guns to Sedgely (Albo, Pltff. Ex. 24). Petitioner's and Ettlinger's guns were the only mutilated Marlin guns on the market and Ettlinger's sales, as did the Petitioner's, showed that the market for the mutilated guns did continue up to the time of the requisition and there is no evidence to show that the Petitioner's market was discontinued in October. The fact is that it was not discontinued until the Respondent requisitioned all of such guns available.

The Court also failed to find that Sagor, an arms dealer since 1921, who was purchasing and selling arms, including mutilated and non-mutilated machine guns, and selling them to other dealers and South American countries up to 1942, and that through the last 6 months of 1942 he was thoroughly familiar with the Petitioner's guns and parts and he stood ready, willing and able to buy all of Petitioner's guns that the Van Karner Corporations failed to take (Albo, Sagor 71-4).

The Court in its Finding 10, (R. 10), found that in 1943 the Navy Department offered a quantity of Marlin guns

which had not been mutilated but were in their original condition to any of the armed forces or our allies who might desire to acquire them, but no Nation made any effort to take them and the Navy Department disposed of them as scrap. The Court failed to find all the facts in connection with that offer. It failed to find that this offer made in 1943, was through the Munitions Assignment Committee of the War Department and the guns were not offered as good guns or shootable guns and it made no representation as to the condition of the guns and no warranty as to the guns or supply of spare parts. At the same time that it was offering the Marlin guns as set forth above it was offering our allies the new and superior Browning machine guns on Lend-Lease terms. The facts which the Court did not find and which were established by Respondent's witnesses would certainly be pertinent as an explanation of why there were no takers of the offer of the Marlin guns (International Studler 521, Ernshaw 359-360; Van Karner, Ernshaw 358-370, Carten 384-5, 397.)

The requisition was to take all machine guns * * * and all parts therefor. The machine belts were a part for the Petitioner's guns as the guns could not be operated without belts and the belts were sold by the Petitioner as adjuncts to or parts for Marlin machine guns. Although the requisition called for the taking of all parts of machine guns. Respondent did not take machine gun belts and Petitioner having no Marlin guns to sell could not dispose of the Marlin machine gun belts. They should have been taken under the terms of the requisition and the price at which they were being sold, i. e., $1.00 each should have been allowed for the belts on hand (Albo, Paley 187-9, 223-4, 229-231).

Just Compensation

In arriving at the fair and just compensation to which the Petitioner was entitled the Court ignored the ordinary rules for determining the just compensation. The primary rule for determining just compensation is the market value. This Court in *United States* v. *Toronto, Hamilton and Buffalo Navigation Company,* 338 U. S. 396, held—

> "Two cases in this Court both involving the requisitioning of coal have stated the rule that where 'private property is taken for public use and there is a market price prevailing at the time *and place* of the taking, that price is just compensation'. *United States* v. *New River Collieries Company,* 262 U. S. 341, 344; *Davis* v. *George B. Newton Coal Company,* 267 U. S. 292, 301".

The language of the New River Collieries case is all pertinent to the issue herein.

This Court further said in that case where the sales were so few as not to establish a market "that does not put out of hand the bearing which the scattered sales may have on what an ordinary purchaser would have paid for the claimant's property". The only way that the fair market price of an article can be determined is from prior sales. Here the Court brushed aside all prior sales and ignored them completely, erroneously holding that the Petitioner's market for its property had disappeared.

We submit that the sales shown above do show a market price for the Petitioner's guns.

In *United States* v. *Miller,* 317 U. S. 369, this Court held at page 375 that "The owner is to receive no more than indemnity for his loss and his award cannot be enhanced by any gain to the taker". In this case the Court below adopted the reverse of that proposition and held that the

value of the property to the Petitioner could be decreased by the loss to the Respondent by arbitrarily classifying and disposing of Petitioner's guns and parts for scrap. In *United States* v. *Causby,* 328 U. S. 256, at page 261, this Court said, "It is the owner's loss and not the taker's gain which is the measure of the value of the property taken."

In *Williams, et al.* v. *United States,* 111 Ct. Cl. 356, the Respondent therein had requisitioned a lot of automobiles and automobile parts from a dealer who operated an automobile graveyard. Petitioner's business for years had been salvaging from derelict automobiles and sale of usable parts. The requisition included many usable and salable parts. That Court held that these usable parts should not have been classified as scrap and determined the value of them by Petitioner's inventory and *previous sales* of these usable parts. That Court said at page 369:

> "On the other hand to treat as scrap 1,257 automobiles even though highly used and partially dismantled when they represented a substantial portion of the business that had been operated continuously for twelve years is not a reasonable basis for just compensation. *Schaffer* v. *United States,* 104 Ct. Cls. 229."

That case was not appealed. See also *Broadfoot* v. *United States,* 113 Ct. Cl. 280.

This Court said in *Roberts* v. *New York,* 295 U. S. 264, 282, "The question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189, *United States* v. *Chandler-Dunbar Water Power Company,* 229 U. S. 53.

We submit that this case below is contrary to this Court's established rule for determining just compensation for private property taken for public use; that it establishes new and dangerous principles. Furthermore the Court below

found as facts matters that were not proven and failed to find proven facts. This Court should review these errors of law and facts.

Respectfully submitted,

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